

November 16, 2009

## Haddock Update – Class Certification Granted

U.S. District Judge Stefan Underhill recently granted plaintiffs' motion for class certification in *Haddock v. Nationwide Financial Services Inc.*, No. 3:01-cv-1552 (SRU) (D. Conn.), a lawsuit alleging that defendant engages in certain revenue sharing practices that violate ERISA. Judge Underhill found that plaintiffs met all of the requirements for certifying a class under Rule 23(b)(2). (Click [here](#) for the opinion.)

In 2001, trustees for a number of employer-sponsored profit-sharing retirement plans filed a putative class action against defendant (the plans' investment provider), alleging that certain payments it received from mutual funds or their affiliates were actually provided in exchange for offering the funds as plan investment options under defendant's variable annuity contracts, rather than for administrative services rendered, and that such payments constituted a breach of fiduciary duty under ERISA. In April 2006, the district court denied defendant's motion for summary judgment in a widely publicized opinion that held, *inter alia*, that there were triable issues of fact on whether defendant was an ERISA fiduciary by virtue of its authority to eliminate and substitute underlying fund investment options and/or on the basis that revenue sharing payments might be plan assets under ERISA. (Click [here](#) for our prior alert on that decision.)

Plaintiffs subsequently filed a fifth amended complaint, which survived a motion to dismiss in October 2007. (Click [here](#) for our prior alert on that decision.) Plaintiffs then filed a motion for class certification, seeking to certify a class of the trustees of all ERISA-covered employee benefit plans that had either group or individual variable annuity contracts with defendant.

Defendant challenged the trustees' standing to bring a class action on behalf of other trustees and challenged the individual standing of a trustee of a plan that terminated during the pendency of the case. Judge Underhill rejected both arguments, holding that plaintiffs' standing to pursue their own claims was sufficient to pursue class claims and that standing is determined at the time suit is filed, so that later termination of a plan did not affect standing.

Judge Underhill found that all of the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) were met. He then considered whether a class could be certified under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Judge Underhill determined that if the trustees prevail in proving that defendant was a fiduciary and breached its duties, then injunctive and declaratory relief would be appropriate for the entire class.

He then considered whether plaintiffs' claims met the requirement under Rule 23(b)(2) that the injunctive and declaratory relief sought must predominate over the monetary relief sought. He held that this requirement would be met if "the Trustees can demonstrate that they would pursue their claims for injunctive relief and declaratory relief even in the absence of monetary relief, and that any injunctive or declaratory relief would be both reasonably necessary and appropriate should they succeed on the merits of their claims." Judge Underhill concluded that this requirement was met, holding that a reasonable plaintiff would bring this suit to obtain the declaratory and injunctive relief and that the monetary relief sought "is ancillary to and derivative of" a breach of fiduciary duty. Judge Underhill also rejected defendant's argument that a class could not be certified because the court would have to make individualized inquiries into whether defendant acted as a fiduciary, reasoning that plaintiffs' argument, if

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successful, would establish defendant as a fiduciary of all of the plans as a result of defendant's contractual relationship with the plans.

Finally, Judge Underhill found that a class action would be both manageable and efficient and certified a class of

All trustees of all employee pension benefit plans covered by ERISA which had variable annuity contracts with Nationwide or whose participants had individual variable annuity contracts with Nationwide at any time from January 1, 1996, or the first date Nationwide began receiving payments from mutual funds based on a percentage of the assets invested in the funds by Nationwide, whichever came first, to the date of November 6, 2009.

Though Rule 23(b)(2) does not require notice or opt-out rights for absent class members, Judge Underhill found that there were due process concerns arising from the fact that monetary relief is being sought in addition to injunctive relief that necessitated notice and opt-out rights in this case. Accordingly, Judge Underhill ordered that class members be given notice and opt-out rights as set forth in Rule 23(c)(2)(B).

A number of courts have certified classes in ERISA revenue sharing cases directed against single plan sponsors, but this is the first grant of class certification in a case directed against a financial services provider on behalf of all the plans it served. The U.S. District Court for the Southern District of Iowa, the only other court to address certification in this context, denied class certification in *Ruppert v. Principal Life Insurance Co.*, No. 4:07-cv-0344-JAJ (S.D. Iowa Aug. 27, 2008). (Click [here](#) for our prior alert on that decision.)



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